

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

LESTER TUCKER,

Plaintiff,

v.

CITY OF ELK GROVE, et al.,

Defendants.

No. 2:20-cv-01620-DAD-KJN

ORDER GRANTING IN PART AND
DENYING IN PART DEFENDANTS'
MOTION FOR SUMMARY JUDGMENT

(Doc. Nos. 13, 16)

This matter is before the court on the motion for summary judgment filed on behalf of defendants City of Elk Grove, Elk Grove Police Department, Officer Jason Kenneth Miller, and Officer Musa Fuad Abedrabbo (collectively, “defendants”) on April 6, 2022. (Doc. No. 13.) The pending motion was taken under submission without oral argument by the previously assigned district judge on May 9, 2022.¹ (Doc. No. 19.) For the reasons explained below, defendants’ motion for summary judgment will be granted in part and denied in part.

BACKGROUND

A. Factual Background

This case arises from the non-lethal shooting of plaintiff Lester Tucker by two law enforcement officers after plaintiff, who was reportedly armed, ran away from the police during

¹ On August 25, 2022, this case was reassigned to the undersigned. (Doc. No. 23.)

1 their investigation of a possible trailer break-in on the streets of Elk Grove.

2 The facts leading up to the shooting are largely undisputed.² Shortly after 11:00 p.m. on
 3 April 20, 2019, the Elk Grove Police Department received an anonymous call reporting a suspect
 4 fitting plaintiff's description breaking into a parked trailer. (DUF ¶ 1.) It was further reported by
 5 the anonymous caller that the individual had concealed a handgun beneath his sweatshirt (DUF
 6 ¶ 2) and that he was accompanied by a female (Doc. No. 13-3 at 2). Two officers of the Elk
 7 Grove Police Department were dispatched to the scene: defendant Officer Miller and defendant
 8 Officer Abedrabbo. (Doc. No. 17-2 at 41.) Defendant Abedrabbo, the assigned backup officer,
 9 arrived at the location first. (*See* Doc. No. 13-8 at 3.) When defendant Abedrabbo arrived on the
 10 scene, plaintiff was with another individual, Tessa Marker, and they were standing on the
 11 sidewalk with a dog on a leash. (PUDF ¶ 9.) Neither plaintiff nor Ms. Marker was in or touching
 12 the trailer. (PUDF ¶ 12.)

13 Detectives from the Elk Grove Police Department interviewed the two defendant officers
 14 on April 23, 2019 as part of an investigation into the April 20, 2019 shooting incident. (*See* Doc.
 15 Nos. 13-8; 13-11; 17-2 at 60–66.) At this interview, defendant Abedrabbo mentioned having
 16 been surprised to see that plaintiff and Ms. Marker were still at the scene, stating, “[W]hen you
 17 get a call for this . . . usually they’re not there especially this kind associated with the call where
 18 there’s a possible, um, crime.” (Doc. No. 17-2 at 60.) Similarly, defendant Miller stated in his
 19 interview that he was surprised when defendant Abedrabbo had radioed that the subjects were still
 20 on the scene: “I wasn’t really expecting them to be on scene just because if they’re breaking into
 21 trailer . . . they . . . usually break in a trailer and they’d leave.” (Doc. No. 13-8 at 3.) Defendant
 22 Miller stated that when he learned that the subjects were still present, he hurried to the scene in
 23

24 ² In their statements of undisputed and disputed facts, the parties have omitted several important
 25 facts which are necessary to fully understand what occurred during the incident giving rise to this
 26 lawsuit. Thus, in addition to deriving the facts from the undisputed facts as stated by defendants
 27 and responded to by plaintiff (Doc. No. 22-1 at 2–11 (“DUF”)) and the undisputed and disputed
 28 facts as stated by plaintiff and responded to by defendants (*id.* at 11–19 (“PUDF”)), the court
 provides the following factual background based on the exhibits filed in support of defendants’
 motion for summary judgment and plaintiff’s opposition thereto. (Doc. Nos. 13-2, 13-3, 13-4, 13-
 5, 13-6, 13-7, 13-8, 13-9, 13-10, 13-11, 13-12, 17-2).

1 order to provide backup to defendant Abedrabbo because the anonymous caller had reported
2 seeing the suspect with a weapon. (*Id.*)

3 Many of the events that occurred during the incident were captured to some extent on
4 defendant Abedrabbo's body-worn camera (Doc. No. 13-4, "VA"), defendant Miller's body-worn
5 camera (Doc. No. 13-5, "VM"), and the in-car camera recording from defendant Miller's vehicle
6 (Doc. No. 13-6, "VC"). Defendant Abedrabbo's body-worn camera recorded his interaction with
7 plaintiff, with audio, though not all of that video footage is clear. Nonetheless, the footage does
8 show that defendant Abedrabbo informed plaintiff and Ms. Marker that there had been a report of
9 an individual tampering with the trailer which was parked next to them. (VA at 00:45–00:48.)
10 Plaintiff explained that he was checking on the trailer for a friend. (VA at 00:49–00:52.)
11 Defendant Abedrabbo then requested identification from plaintiff and Ms. Marker, to which
12 plaintiff replied that they had not done anything wrong. (VA at 1:04–1:08.) Defendant
13 Abedrabbo instructed plaintiff not to put his hands in his pockets and told plaintiff that the 911
14 caller mentioned seeing the suspect with a gun. (VA at 1:15–1:21.) Plaintiff replied that nobody
15 had a gun. (VA at 1:20–1:23.) Defendant Abedrabbo then requested that plaintiff and Ms.
16 Marker take a seat on the curb, and they complied. (VA at 1:29–1:34.) Approximately sixteen
17 seconds later, plaintiff stood up, kissed Ms. Marker's forehead, and started running in the
18 opposite direction from Officer Abedrabbo. (VA at 1:50–1:53.) As plaintiff was standing up,
19 defendant Abedrabbo had told him to "have a seat" three times; plaintiff did not comply with that
20 instruction. (VA at 1:50–1:52.)

21 The parties agree that plaintiff, a convicted felon, ran away because he did in fact have a
22 loaded handgun in his possession at that time and he knew that he could go back to prison
23 because he was a convicted felon in possession of a firearm. (DUF at ¶ 5.) Before plaintiff ran,
24 defendant Abedrabbo did not observe any illegal, threatening, or suspicious behavior on
25 plaintiff's part. (PUDF ¶ 11.) Nor did defendant Abedrabbo observe any firearm. (PUDF ¶ 13.)

26 Defendant Abedrabbo chased after plaintiff on foot and radioed in, "I got one running."
27 (VA at 1:54–1:57.) While chasing plaintiff, defendant Abedrabbo repeatedly yelled, "Get on the
28 ground." (VA at 2:00–2:26.) Plaintiff testified at his deposition that he never heard defendant

1 Abedrabbo yelling to “stop” or “get on the ground” because he was too far away from him to hear
2 anything. (Doc. No. 17-2 at 53.)

3 According to defendant Miller, he pulled up to the scene just before plaintiff fled. (Doc.
4 No. 13-8 at 3.) As soon as plaintiff started running, defendant Miller pursued him in his vehicle.
5 (*Id.*) About one minute into defendant Abedrabbo’s foot chase, in an attempt to overtake
6 plaintiff, defendant Miller drove past defendant Abedrabbo, who was still chasing plaintiff on
7 foot. (DUF ¶ 8.) Defendant Miller said at his interview that when he drove past defendant
8 Abedrabbo, he had a clear view of plaintiff running “with one arm moving in a running motion
9 and the other arm kind of pinned against his body.” (Doc. No. 13-8 at 3.) However, according to
10 plaintiff, both of his arms were swinging back and forth in the typical fashion when one runs.
11 (Doc. No. 17-2 at 6.)

12 Defendant Miller turned his police vehicle to his right, and the front of the vehicle briefly
13 collided with plaintiff. (DUF ¶ 11.) In their statement of undisputed facts, defendants state, “Just
14 prior to the collision, Officer Miller could see Tucker grabbing a dark object (gun) from under his
15 hoodie.” (DUF ¶ 12.) To support this assertion, defendants cite to screenshot 00914 from the in-
16 car camera footage (*id.*) (citing Doc. No. 13-9 at 1), which depicts the moment defendant Miller
17 struck plaintiff with his vehicle. (*Compare* Doc. No. 13-9 at 1 *with* VC at 00:31–00:32.)³
18 However, screenshot 00914 merely depicts a black blur in plaintiff’s left hand; it certainly does
19 not show the object in plaintiff’s hand to be a gun. (*See* Doc. No. 13-9 at 1.) Indeed, when
20 viewing the in-car camera recording footage itself, as opposed to merely the screenshot, the court
21 notes that the black object in plaintiff’s left hand actually appears to have a floppy, cloth-like
22 form, as opposed to any sort of rigid, solid shape. (VC at 00:31–00:32.)⁴ In his declaration,
23 plaintiff states that the item in his left hand was a black balaclava (Doc. No. 17-2 at 7), a cloth

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25 ³ In support of this purported fact, defendants also cite to Miller’s interview at page 002508,
26 which is supposedly included in exhibit 6 of defense counsel Bruce Praet’s declaration. (DUF ¶
27 12) (citing Doc. No. 13-8). However, defendants did not include a page 002508 in their exhibit 6.
28 (*See generally*, Doc. No. 13-8.)

⁴ The video footage also shows that defendant Miller had observed plaintiff’s hand for only one
or two seconds. (*See* VC at 00:31–00:32.)

1 headgear which only exposes a part of the face.⁵ According to plaintiff's declaration, the collision
2 with the police vehicle also caused him to drop his balaclava, leaving his left hand empty when he
3 stood up. (Doc. No. 17-2 at 6.)

4 At his deposition, plaintiff testified that being struck by the police vehicle caused him to
5 fall onto his back and butt, resulting in him suffering injuries. (*Id.* at 55.) Plaintiff testified that
6 after being hit by the police vehicle, he stood up in preparation to flee because he feared being
7 arrested as a convicted felon in possession of a firearm. (*Id.* at 55, 56.) He also testified that after
8 he stood up but before he could run, the officer who drove the vehicle that hit him got out, ran to
9 the back of the vehicle, and then rushed toward plaintiff, firing shots at him. (*Id.* at 56.)

10 Defendant Miller's body-worn camera shows him exiting his vehicle from the driver's
11 seat door and moving toward the back of his vehicle. (VM at 5:31–5:33.) Approximately two
12 seconds after defendant Miller exited the vehicle, just as he was rounding the driver's-side back
13 corner of the vehicle, he shot plaintiff, who was standing next to the passenger side of the vehicle.
14 (*Id.*) At that point, defendant Abedrabbo had just caught up to plaintiff, and plaintiff was facing
15 away from defendant Abedrabbo and towards defendant Miller. (VA at 2:23-2:27.) Defendant
16 Abedrabbo likewise shot plaintiff. (*id.*; DUF ¶ 15.)

17 The parties purport to dispute a key fact: whether plaintiff reached for his waistband or
18 sweatshirt pocket immediately before being shot. Plaintiff testified at his deposition and stated in
19 his declaration that at no time did he reach for his waistband or gun. (Doc. No. 17-2 at 6, 57.)
20 Defendants, on the other hand, assert in their statement of undisputed facts that the defendant
21 officers saw plaintiff reach for his waistband. First, defendants assert: "As Officer Miller exited
22 his police vehicle, Tucker reached for his waistband and Miller fired." (DUF ¶ 14.) Because of
23 the grainy nature of the video footage and screenshots that defendants cite in support of this
24 asserted fact, the court cannot find that the evidence substantiates defendants' assertion that
25 plaintiff was reaching for his waistband. (*See* VM at 5:34; VA at 2:26; Doc. No. 13-10.) Next,
26

27 ⁵ Defendant Abedrabbo's body-camera footage does show that when he was first talking with
28 plaintiff and Ms. Marker, plaintiff was carrying a cell phone in his right hand and a dark cloth-like
item in his left hand. (VA at 1:17.)

1 defendants assert: “Seeing Tucker reach for his waistband and hearing a gunshot, Officer
2 Abedabbo [sic] fired.” (DUF ¶ 15.) Defendants cite page 002494 of defendant Abedrabbo’s
3 interview transcript to support this asserted fact. (*Id.*) (citing Doc. No. 13-11.) Yet, nowhere on
4 that page of the transcript does defendant Abedrabbo state that he saw plaintiff reaching for his
5 waistband or that he heard a gunshot. (*See* Doc. No. 13-11 at 3.)

6 Another officer, Officer Cristina Gonzalez, arrived on scene shortly after the defendant
7 officers shot plaintiff. (*See* Doc. No. 17-2 at 41.) According to her incident report, plaintiff was
8 laying on the ground where defendant Miller had him at gun point when Officer Gonzalez
9 handcuffed plaintiff and located a small automatic handgun tucked under plaintiff’s shirt and
10 sweatshirt on his right side. (*Id.*) On June 9, 2020, after an internal administrative investigation,
11 Lieutenant Ryan Elmore at the Elk Grove Police Department exonerated both officers with
12 respect to the shooting in accordance with police department policy. (*Id.* at 68–69.)

13 **B. Procedural Background**

14 On August 12, 2020, plaintiff filed the complaint initiating this civil action against
15 defendants. (Doc. No. 1.) In his complaint, plaintiff asserts a constitutional claim under 42
16 U.S.C. § 1983 against all defendants for allegedly violating his rights under the Fourth
17 Amendment by unlawfully seizing him. (*Id.* at 5.) In addition, plaintiff brings the following state
18 law claims against all defendants: (1) violation of Article I § 13 of the California Constitution;
19 (2) violation of California Civil Code § 43; (3) violation of the Bane Act, California Civil Code §
20 52.1; (4) negligence; and (5) battery. (*Id.* at 6.)

21 On April 6, 2022, defendants filed the pending motion seeking summary judgment in their
22 favor as to all of plaintiff’s claims. (Doc. No. 13.) Specifically, as to plaintiff’s § 1983 claim
23 against the defendant officers, defendants argue that they did not violate plaintiff’s constitutional
24 rights, and that even if they did, they are entitled to qualified immunity. (*Id.* at 13–18.) As to
25 plaintiff’s other claims, defendants argue that they are entitled to summary judgment because
26 plaintiff has failed to come forward with evidence establishing the requisite elements of those
27 claims. (*See id.* at 18–23.) On April 29, 2022, plaintiff filed an opposition to the pending motion,

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1 and on June 13, 2022, defendants filed their reply thereto. (Doc. Nos. 17, 22.)⁶

2 LEGAL STANDARD

3 Summary judgment is appropriate when the moving party “shows that there is no genuine
4 dispute as to any material fact and the movant is entitled to judgment as a matter of law.” Fed. R.
5 Civ. P. 56(a).

6 In summary judgment practice, the moving party “initially bears the burden of proving the
7 absence of a genuine issue of material fact.” *In re Oracle Corp. Sec. Litig.*, 627 F.3d 376, 387
8 (9th Cir. 2010) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986)). The moving party
9 may accomplish this by “citing to particular parts of materials in the record, including
10 depositions, documents, electronically stored information, affidavits or declarations, stipulations
11 (including those made for purposes of the motion only), admissions, interrogatory answers, or
12 other materials,” or by showing that such materials “do not establish the absence or presence of a
13 genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact.”
14 Fed. R. Civ. P. 56(c)(1)(A), (B).

15 Where the party moving for summary judgment will bear the burden of proof at trial, as is
16 the case here with respect to defendants’ affirmative defense of qualified immunity, that party
17 must come forward with evidence that would entitle it to a directed verdict if the evidence were
18 uncontroverted at trial. *Houghton v. South*, 965 F.2d 1532, 1536 (9th Cir. 1992); *see also*
19 *Soremekun v. Thrifty Payless, Inc.*, 509 F.3d 978, 984 (9th Cir. 2007) (“Where the moving party
20 will have the burden of proof on an issue at trial, the movant must affirmatively demonstrate that
21 no reasonable trier of fact could find other than for the moving party.”)

22 When the non-moving party bears the burden of proof at trial, “the moving party need
23 only prove that there is an absence of evidence to support the non-moving party’s case.” *Oracle*
24 *Corp.*, 627 F.3d at 387 (citing *Celotex*, 477 U.S. at 325); *see also* Fed. R. Civ. P. 56(c)(1)(B).
25 Indeed, after adequate time for discovery and upon motion, summary judgment should be entered

26 ⁶ With his opposition to the pending motion for summary judgment, plaintiff filed a separate
27 “motion to strike” (Doc. No. 16), which is not procedurally proper, and in any event consists of
28 objections to certain of defendants’ evidence. Therefore, the court will construe that motion as
plaintiff’s objections to defendants’ evidence and will address those objections in this order.

1 against a party who fails to make a showing sufficient to establish the existence of an element
2 essential to that party's case, and on which that party will bear the burden of proof at trial. *See*
3 *Celotex*, 477 U.S. at 322. "[A] complete failure of proof concerning an essential element of the
4 nonmoving party's case necessarily renders all other facts immaterial." *Id.* at 322–23. In such a
5 circumstance, summary judgment should be granted, "so long as whatever is before the district
6 court demonstrates that the standard for the entry of summary judgment . . . is satisfied." *Id.* at
7 323.

8 If the moving party meets its initial responsibility, the burden then shifts to the opposing
9 party to establish that a genuine issue as to any material fact actually does exist. *See Matsushita*
10 *Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). In attempting to establish the
11 existence of this factual dispute, the opposing party may not rely upon the allegations or denials
12 of its pleadings but is required to tender evidence of specific facts in the form of affidavits or
13 admissible discovery material in support of its contention that the dispute exists. *See Fed. R. Civ.*
14 *P.* 56(c)(1); *Matsushita*, 475 U.S. at 586 n.11; *Orr v. Bank of Am., NT & SA*, 285 F.3d 764, 773
15 (9th Cir. 2002) ("A trial court can only consider admissible evidence in ruling on a motion for
16 summary judgment."). The opposing party must demonstrate that the fact in contention is
17 material, i.e., a fact that might affect the outcome of the suit under the governing law, and that the
18 dispute is genuine, i.e., the evidence is such that a reasonable jury could return a verdict for the
19 non-moving party. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 250 (1986).

20 In the endeavor to establish the existence of a factual dispute, the opposing party need not
21 establish a material issue of fact conclusively in its favor. It is sufficient that "the claimed factual
22 dispute be shown to require a jury or judge to resolve the parties' differing versions of the truth at
23 trial." *T.W. Elec. Serv., Inc. v. Pac. Elec. Contractors Ass'n*, 809 F.2d 626, 630 (9th Cir. 1987).
24 Thus, the "purpose of summary judgment is to 'pierce the pleadings and to assess the proof in
25 order to see whether there is a genuine need for trial.'" *Matsushita*, 475 U.S. at 587 (citations
26 omitted).

27 "In evaluating the evidence to determine whether there is a genuine issue of fact," the
28 court draws "all inferences supported by the evidence in favor of the non-moving party." *Walls v.*

1 *Cent. Contra Costa Transit Auth.*, 653 F.3d 963, 966 (9th Cir. 2011). It is the opposing party’s
 2 obligation to produce a factual predicate from which the inference may be drawn. *See Richards v.*
 3 *Nielsen Freight Lines*, 602 F. Supp. 1224, 1244–45 (E.D. Cal. 1985), *aff’d*, 810 F.2d 898, 902
 4 (9th Cir. 1987). Finally, to demonstrate a genuine issue, the opposing party “must do more than
 5 simply show that there is some metaphysical doubt as to the material facts. . . . Where the record
 6 taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no
 7 ‘genuine issue for trial.’” *Matsushita*, 475 U.S. at 586–87 (citations omitted).

8 ANALYSIS

9 A. Plaintiff’s Objections to Defendants’ Evidence

10 In connection with his opposition to the pending motion for summary judgment, plaintiff
 11 filed objections to certain evidence presented by defendants. (Doc. No. 16.) Specifically,
 12 plaintiff objects to the excerpts of transcripts of audio-recorded interviews of defendant Officer
 13 Miller (Doc. No. 13-8) and defendant Officer Abedrabbo (Doc. No. 13-11), which are included as
 14 exhibits 6 and 9 to defense counsel’s declaration (Doc. No. 13-2). (Doc. No. 16 at 3.)

15 First, plaintiff objects to the transcript excerpts on the ground that they have not yet been
 16 properly authenticated and because the “best evidence” of what the officers said in their audio-
 17 recorded interviews are the audio recordings themselves. (Doc. No. 16 at 3–4.) At summary
 18 judgment, evidence must be authenticated by affidavits or declarations of persons with personal
 19 knowledge through whom they could be introduced at trial. *Zoslaw v. MCA Distrib. Corp.*, 693
 20 F.2d 870, 883 (9th Cir. 1982). Moreover, “[a] district court may consider inadmissible evidence
 21 as long as the evidence could be presented in an admissible form at trial.” *Fraser v. Goodale*, 342
 22 F.3d 1032, 1036–37 (9th Cir. 2003); *see also Sandoval v. Cnty. of San Diego*, 985 F.3d 657, 666
 23 (9th Cir. 2021). Specifically, here, plaintiff argues that defendants’ attorney’s declaration that the
 24 transcripts were “true and accurate” copies did not properly authenticate the transcripts because
 25 defense counsel lacks the personal knowledge necessary to do so. (Doc. No. 16 at 4) (citing *Orr*,
 26 285 F.3d at 776–77). Plaintiff does not dispute the authenticity of either transcript; he merely
 27 contends that defense counsel did not sufficiently authenticate them. Notably, plaintiff relies on

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1 many of the same interview transcript excerpts as evidence in support of his opposition to the
2 motion for summary judgment. (*See* Doc. No. 17-2 at 60–66.)

3 Nevertheless, in connection with their opposition to plaintiff’s evidentiary objections,
4 defendants cured any arguable defect by submitting: (1) defendant Miller’s declaration that,
5 based on his personal knowledge, exhibit 6 is an accurate transcript of his interview (Doc. No. 18-
6 1); and (2) defendant Abedrabbo’s declaration that, based on his personal knowledge, exhibit 9 is
7 an accurate transcript of his interview (Doc. No. 18-2). This is evidence “sufficient to support a
8 finding that the item is what the proponent claims it is.” *See* Fed. R. Evid. 901(a). Furthermore,
9 both plaintiff’s authentication and best evidence objections are unavailing because the facts
10 underlying the transcript excerpts could be presented in an admissible form at trial through
11 defendants’ live testimony and can thus be considered by the court on summary judgment. *See*
12 *Fraser*, 342 F.3d at 1037; *see also Hughes v. United States*, 953 F.2d 531, 543 (9th Cir. 1992)
13 (holding that an affidavit could be considered on summary judgment, despite hearsay and best
14 evidence rule objections, because the underlying facts of the affidavit would be admissible at
15 trial); *Hodges v. Hertz Corp.*, 351 F. Supp. 3d 1227, 1232 (N.D. Cal. 2018) (“[D]istrict courts in
16 this circuit have routinely overruled authentication and hearsay challenges at the summary stage
17 where the evidence could be presented in an admissible form at trial, following *Fraser*.”).⁷

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19 ⁷ Some courts have concluded that this relaxed standard under *Fraser* applies only to the non-
20 moving party. *See, e.g., Cook v. Lee*, No. 17-cv-02569-PHX-DGC, 2019 WL 2525373, at *3 n.3
21 (D. Ariz. June 19, 2019) (“[T]his focus on the content over the form of evidence at the summary
22 judgment stage applies to the nonmovant[.]”); *United States v. Pac. Health Corp.*, No. 12-cv-
23 00960-RSWL-AJW, 2018 WL 1026361, at *6 n.5 (C.D. Cal. Feb. 20, 2018) (“Exhibits offered ‘in
24 a form not admissible in evidence may be used to avoid, but not to *obtain* summary judgment.’”) (citations omitted). However, the Ninth Circuit has itself applied the *Fraser* principle to allow
25 consideration of inadmissible evidence submitted by the moving party at summary judgment so
26 long as that evidence can ultimately be presented in an admissible form at trial. *See Jeffries v.*
27 *Las Vegas Metro. Police Dep’t*, 713 Fed. App’x 549, 550 (9th Cir. 2017) (holding the district
28 court did not err in considering the moving party’s exhibits, stating that “a district court may
consider inadmissible evidence as long as the evidence could be presented in an admissible form
at trial”) (citing *Fraser* 342 F.3d at 1036–37). The court finds *Jeffries* to be persuasive authority
that the *Fraser* standard applies to both the moving and the non-moving party. *See* 713 Fed.
App’x at 550; *see also Enriquez v. Gemini Motor Transp. LP*, No. 19-cv-04759-PHX-GMS, 2021
WL 5908208, at *2–3 (D. Ariz. Dec. 14, 2021) (concluding that *Fraser* applies to a moving
party’s evidentiary submissions on summary judgment).

Second, plaintiff objects to the transcripts of defendants' interviews on the grounds that they constitute hearsay. (Doc. No. 16 at 5.) Plaintiff argues that the transcripts constitute two levels of hearsay, the first being that "[d]efendants proffer their own self-serving unsworn statements made outside of court to prove the officers' version of what supposedly occurred," and the second being that "the transcript excerpts purport to represent, for the truth of the matter asserted therein, the actual contents of the officers' audio recorded interviews." (Doc. No. 16 at 5.) The court finds that the defendant officers' statements are not inadmissible hearsay with regard to their contents because the defendant officers could testify as witnesses at trial. *See Cherewick*, 578 F. Supp. 3d at 1157 ("[A]s long as a court finds that hearsay evidence could be presented in an admissible form at trial . . . , it may consider the evidence when ruling on the motion for summary judgment.").

Because the court concludes that the officers' interview statements can be presented in an admissible form at trial, i.e., by their live testimony, the court may consider the contents of the interview transcripts in addressing the pending summary judgment motion. *See Fraser*, 342 F.3d at 1037; *see also Sandoval*, 985 F.3d at 666 ("If the contents of a document can be presented in a form that would be admissible at trial—for example, through live testimony by the author of the document—the mere fact that the document itself might be excludable hearsay provides no basis for refusing to consider it on summary judgment."). Accordingly, plaintiff's objections to defendants' evidence will be overruled.

B. Defendants' Motion for Summary Judgment on Plaintiff's Claims

1. Fourth Amendment Excessive Use of Force Claim: Individual Liability

Defendants move for summary judgment in their favor as to plaintiff's 42 U.S.C. § 1983 excessive use of force claim, in which plaintiff alleges that defendants violated the Fourth Amendment by shooting him. (Doc. No. 13 at 13–18.) Defendants so move on two grounds. (*See id.*) First, defendants contend that under the undisputed evidence on summary judgment, the defendant officers' use of force was "objectively reasonable under the circumstances," and thus plaintiff cannot establish the requisite use of unreasonable force. (*Id.* at 13.) Second, defendants argue that they are entitled to judgment in their favor on qualified immunity grounds. (*Id.* at 15.)

1 Because defendants’ argument that the defendant officers’ conduct was “objectively reasonable”
 2 (*id.* at 13) is part of the qualified immunity analysis, the court will not address it separately.

3 Under § 1983, a private right of action exists against anyone who, “under color of” state
 4 law, causes a person to be subjected “to the deprivation of any rights, privileges, or immunities
 5 secured by the Constitution and laws” 42 U.S.C. § 1983. “Section 1983 does not create
 6 substantive rights; it merely serves as the procedural device for enforcing substantive provisions
 7 of the Constitution and federal statutes.” *Crumpton v. Gates*, 947 F.2d 1418, 1420 (9th Cir. 1991)
 8 (citing *Chapman v. Hous. Welfare Rights Org.*, 441 U.S. 600, 617 (1979)). State officials are
 9 entitled to qualified immunity from a § 1983 suit unless “(1) they violated a federal statutory or
 10 constitutional right, and (2) the unlawfulness of their conduct was ‘clearly established at the
 11 time.’” *District of Columbia v. Wesby*, — U.S. —, 138 S. Ct. 577, 589 (2018) (quoting
 12 *Reichle v. Howards*, 566 U.S. 658, 664 (2012)).

13 Here, “[b]ecause the moving defendant bears the burden of proof on the issue of qualified
 14 immunity, he or she must produce sufficient evidence to require the plaintiff to go beyond his or
 15 her pleadings. The defendant’s burden is to demonstrate the absence of a genuine issue of
 16 material fact.” *Moreno v. Baca*, 431 F.3d 633, 638 (9th Cir. 2005) (internal citation omitted).

17 a. *Step One: Whether a Constitutional Right Was Violated*

18 Under the Fourth Amendment, “[t]he right of the people to be secure in their persons,
 19 houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and
 20 no Warrants shall issue, but upon probable cause.” U.S. Const. amend. IV. “The Fourth
 21 Amendment does not proscribe all state-initiated searches and seizures; it merely proscribes those
 22 which are unreasonable.” *Florida v. Jimeno*, 500 U.S. 248, 250 (1991) (citations omitted); *see*
 23 *also United States v. Chan-Jimenez*, 125 F.3d 1324, 1326 (9th Cir. 1997) (“For purposes of the
 24 Fourth Amendment, a seizure occurs when a law enforcement officer, by means of physical force
 25 or show of authority, in some way restrains the liberty of a citizen.”).

26 Plaintiff’s § 1983 claim for the excessive use of force in violation of the Fourth
 27 Amendment is governed by an “objective reasonableness standard.” *Graham v. Connor*, 490 U.S.
 28 386, 388 (1989) (internal quotation marks omitted). This standard requires a “careful balancing

1 of the nature and quality of the intrusion on the individual's Fourth Amendment interests against
2 the countervailing governmental interests at stake." *Id.* at 396 (quoting *Tennessee v. Garner*, 471
3 U.S. 1, 8 (1985)). The calculus "must embody allowance for the fact that police officers are often
4 forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly
5 evolving—about the amount of force that is necessary in a particular situation." *Id.* at 396–97.
6 Reasonableness in this context is to be judged "from the perspective of a reasonable officer on the
7 scene, rather than with the 20/20 vision of hindsight." *Id.* at 396.

8 "[T]he reasonableness of force used is ordinarily a question of fact for the jury." *Liston v.*
9 *Cnty. of Riverside*, 120 F.3d 965, 976 n.10 (9th Cir. 1997), *as amended* (Oct. 9, 1997). Indeed,
10 the Ninth Circuit has repeatedly recognized that "summary judgment should be granted sparingly
11 in excessive force cases." *Gonzalez*, 747 F.3d at 795; *see also Seidner v. de Vries*, 39 F.4th 591,
12 601 (9th Cir. 2022); *Estate of Lopez ex rel. Lopez v. Gelhaus*, 871 F.3d 998, 1006 (9th Cir. 2017);
13 *C.V. ex rel. Villegas v. City of Anaheim*, 823 F.3d 1252, 1255 (9th Cir. 2016); *Green v. City of*
14 *San Francisco*, 751 F.3d 1039, 1049 (9th Cir. 2014); *Avina v. United States*, 681 F.3d 1127, 1130
15 (9th Cir. 2012) (citation omitted); *Santos v. Gates*, 287 F.3d 846, 853 (9th Cir. 2002) ("Because
16 such balancing nearly always requires a jury to sift through disputed factual contentions, and to
17 draw inferences therefrom, we have held on many occasions that summary judgment or judgment
18 as a matter of law in excessive force cases should be granted sparingly."). Thus, while it is true
19 that officers "are often forced to make split-second judgments," "it is equally true that even where
20 some force is justified, the amount actually used may be excessive." *Santos*, 287 F.3d at 853
21 (citations omitted). In the final analysis, "[f]orce is excessive when it is greater than is reasonable
22 under the circumstances." *Id.* at 854 (citing *Graham*, 490 U.S. at 395).

23 Here, on one side of the balancing scale, the "nature and quality of the intrusion" were the
24 most intrusive possible: the defendant officers used deadly force in shooting plaintiff. *See*
25 *Seidner*, 39 F.4th at 596 (quoting *Smith v. City of Hemet*, 394 F.3d 689, 693 (9th Cir. 2005))
26 ("Some uses of force can be quantified categorically. The best example is shooting a firearm,
27 which by definition is 'deadly force': force that 'creates a substantial risk of causing death or
28 serious bodily injury.'").

On the other side of the scale is the countervailing governmental interests at stake. In *Graham*, the Supreme Court listed several factors to be considered in determining the government’s interest in the force it used: (1) “the severity of the crime at issue,” (2) “whether the suspect poses an immediate threat to the safety of the officers or others,” and (3) “whether [the suspect] is actively resisting arrest or attempting to evade arrest by flight.” 490 U.S. at 396. The threat element is the most important consideration, and “[a]n officer’s use of deadly force is reasonable only if ‘the officer has probable cause to believe that the suspect poses a significant threat of death or serious physical injury to the officer or others.’” *Gonzalez v. City of Anaheim*, 747 F.3d 789, 793 (9th Cir. 2014) (quoting *Garner*, 471 U.S. at 3); *see also S.R. Nehad v. Browder*, 929 F.3d 1125, 1132–33 (9th Cir. 2019). The question on summary judgment “is whether a reasonable jury would necessarily find that [the officer] perceived an immediate threat of death or serious physical injury at the time he shot” the plaintiff. *Gonzalez*, 747 F.3d at 794. Here, defendants argue that the available evidence on summary judgment could lead a reasonable jury to only one conclusion: the officers reasonably perceived that plaintiff posed an immediate threat to their life and safety. (Doc. No. 13 at 14–15.)

In assessing the governmental interests at stake to determine whether they justify the use of deadly force, the court begins with the “most important” *Graham* factor: whether plaintiff posed a threat to the officers or the public. *See Gonzalez*, 747 F.3d at 793. The court will analyze this factor as to each defendant officer in turn. Because the court finds consideration of this factor dispositive on summary judgment, the court will not address the other *Graham* factors, nor complete the balancing test prescribed by *Graham*.

i. Defendant Abedrabbo

Defendants argue that defendant Abedrabbo shot plaintiff because he reached for his waistband, contending that an officer may use deadly force against a person who is armed, or reasonably suspected of being armed, when he reaches for his waistband. (Doc. No. 13 at 14.) The case law supports defendants’ statement of the law. For instance, the Ninth Circuit has held that “[i]t would be unquestionably reasonable for police to shoot a suspect in [plaintiff’s] position if he reaches for a gun in his waistband, or even if he reaches there for some other reason.” *Cruz*

1 v. *City of Anaheim*, 765 F.3d 1076, 1078 (9th Cir. 2014). But to accept defendants' contention
2 that defendant Abedrabbo's actions were objectively reasonable as a matter of law, the court
3 would have to find that under the undisputed evidence, defendant Abedrabbo reasonably believed
4 that plaintiff was reaching for his waistband. However, there is simply no evidence before the
5 court on summary judgment to support such a finding.

6 The only evidence that defendants have cited in support of their assertion that "[s]eeing
7 Tucker reach for his waistband and hearing a gunshot, Officer Abedabbo [sic] fired" was
8 defendant Abedrabbo's interview at page 002494. (DUF ¶ 15.) But, as discussed above, page
9 002494 of the interview does not support this assertion whatsoever. Of course, it is possible that
10 the assertion might find some support elsewhere in the evidence submitted on summary judgment.
11 However, courts are not required to scour the summary judgment record to piece together the
12 facts of the case. As has often been recognized, "[j]udges are not like pigs, hunting for truffles
13 buried" in the record. *Greenwood v. F.A.A.*, 28 F.3d 971, 977 (9th Cir. 1994) (quoting *United*
14 *States v. Dunkel*, 927 F.2d 955, 956 (7th Cir. 1991)); *see also Keenan v. Allan*, 91 F.3d 1275,
15 1279 (9th Cir. 1996) (noting that "[i]t is not our task, or that of the district court, to scour the
16 record in search of a genuine issue of triable fact") (citation omitted). As the moving party
17 bearing the burden of proof, defendants have simply failed to establish that it is undisputed that
18 defendant Abedrabbo reasonably believed that plaintiff was reaching for his waistband.

19 Nor does the body-worn camera footage evidence before the court support defendants'
20 purported fact that defendant Abedrabbo reasonably believed he saw plaintiff reaching for his
21 waistband. Defendant Abedrabbo's body-worn camera footage shows that when defendant
22 Abedrabbo shot plaintiff, he had only just caught up to him and plaintiff was facing away from
23 Abedrabbo such that plaintiff's hand movements were not clearly visible to the officer. Again,
24 defendants therefore have not established the absence of a genuine dispute of material fact as to
25 whether defendant Abedrabbo reasonably believed that plaintiff reached for his waistband or
26 made any other furtive movements suggesting that he posed an imminent threat to the safety of
27 the officers or others.

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1 In its decision in *Cruz*, the Ninth Circuit made clear that an officer may shoot a suspect
2 reaching for his waistband, but the court also went on to observe that “if the suspect *doesn’t* reach
3 for his waistband or make some similar threatening gesture, it would clearly be unreasonable for
4 the officers to shoot him[.]” 765 F.3d at 1078–79; *see also Peck v. Montoya*, 51 F.4th 877, 887–
5 88 (9th Cir. 2022) (acknowledging that officers may not “kill suspects who do not pose an
6 immediate threat to their safety or to the safety of others simply because they are armed” and
7 noting that “[w]e have repeatedly distinguished between a suspect who is actively reaching for a
8 weapon and a suspect who is armed but not reaching for the weapon.”) (citations omitted). There
9 is a lack of evidence presented by defendants, and it is coupled with defendants’ failure to cite
10 evidence that actually supports their version of the undisputed facts. In short, the evidence before
11 the court on summary judgment does not establish that defendant Abedrabbo had “probable cause
12 to believe that [plaintiff] pose[d] a significant threat of death or serious physical injury to the
13 officer or others.” *Gonzalez*, 747 F.3d at 793. Rather, the question of whether defendant
14 Abedrabbo saw what he believed to be plaintiff reaching for his waistband is a disputed material
15 fact. Thus, the court cannot determine as a matter of law, based on the evidence before it on
16 summary judgment, that defendant Abedrabbo’s use of force was reasonable or that he is entitled
17 to qualified immunity on that basis.

18 ii. Defendant Miller

19 Here too, the court will begin with the “immediate threat” inquiry. Critically, there is also
20 a genuine dispute of material fact regarding whether plaintiff was reaching for his waistband
21 immediately before he was shot, thus precluding the granting of summary judgment in favor of
22 defendant Miller.

23 Defendants point to video footage evidence in support of their assertion that defendant
24 Miller shot plaintiff because he saw plaintiff reach for his waistband. However, as discussed
25 above, because of the grainy nature of the videos and screenshots that defendants have cited in
26 support of this asserted fact, it is impossible to determine from that evidence whether plaintiff was
27 reaching for his waistband. Plaintiff testified and stated in his declaration that he did not reach for
28 his waistband or gun at any time before he was shot by police. In determining whether defendant

1 Miller is entitled to summary judgment on qualified immunity grounds, the court must credit
2 plaintiff's deposition testimony and declaration that he did not reach for his waistband because
3 plaintiff's version of the events is certainly not "blatantly contradicted by the record." *See Gomez*
4 *v. Fachko*, No. 19-cv-05266-LHK, 2021 WL 1721067, at *9 (N.D. Cal. Apr. 30, 2021) ("In
5 weighing whether an officer is entitled to qualified immunity at summary judgment, the Court
6 'must construe the facts in the light most favorable to the plaintiff.' Specifically, as the Ninth
7 Circuit has explained, the Court must credit plaintiff's version of events unless it is 'blatantly
8 contradicted by the record, so that no reasonable jury could believe it.'") (quoting *Orn v. City of*
9 *Tacoma*, 949 F.3d 1167, 1171 (9th Cir. 2020)).

10 Furthermore, in their statement of undisputed facts, defendants assert that just prior to
11 defendant Miller's vehicle colliding with plaintiff, defendant Miller could see plaintiff grabbing a
12 dark object from under his sweatshirt, citing the in-car camera footage evidence. (DUF ¶ 12)
13 (citing Doc No. 13-9 at 1). However, while the video footage itself captures a fleeting glimpse of
14 what the court perceives as a dark cloth-like item in plaintiff's hand, the video clip itself is
15 extremely brief and quite difficult to discern. Notably, plaintiff states in his declaration that the
16 dark object seen in that footage was a black balaclava, which he dropped when he was struck by
17 defendant Miller's vehicle. (Doc. No. 17-2 at 7.) Viewing this evidence in the light most
18 favorable to plaintiff, a reasonable jury could certainly conclude from this evidence that it was
19 unreasonable for defendant Miller to believe that plaintiff posed an immediate threat to the safety
20 of the defendant officers or others when he shot him. *See Est. of Diaz v. City of Anaheim*, No. 12-
21 *cv-01897-JVS-RNB*, 2013 WL 12207504, at *5 (C.D. Cal. Dec. 18, 2013) ("[I]f Diaz did not
22 have an object resembling a gun in his hand, if he discarded the object before Officer Bennallack
23 shot . . . a reasonable jury could find no immediate threat to the Officers' safety existed.").

24 Confusingly, despite citing to evidence of plaintiff holding a dark object in his hand and
25 asserting in a parenthetical that the object was a "(gun)," defendants do not argue in their pending
26 motion for summary judgment that defendant Miller witnessed the presence of a dark item in
27 plaintiff's hands at the time he actually fired his weapon, or that that was the reason he shot at

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1 plaintiff.⁸ Instead, they argue that defendant Miller saw plaintiff *reaching* for a weapon at his
 2 waistband, and that is why he shot plaintiff. (Doc. No. 13 at 14.) Either way, there remains a
 3 genuine dispute of material fact on the question of whether defendant Miller reasonably believed
 4 he saw plaintiff reaching for his waistband. This critical dispute—which is the crux of
 5 defendants’ contention that defendant Miller’s use of force was objectively reasonable—precludes
 6 the granting of summary judgment in defendant Miller’s favor on qualified immunity grounds.
 7 *See Cruz*, 765 F.3d at 1079–80 (holding that summary judgment in the defendant officers’ favor
 8 was precluded by disputed factual issues regarding whether the suspect—a known gang member
 9 whom officers had been told was carrying a gun in his waistband—had reached for his waistband
 10 just before being shot, despite officers’ testimony that the suspect had reached for his waistband).

11 In sum, viewing the evidence in the light most favorable to plaintiff, as the court must do
 12 at this stage of the case, defendant Miller has not established that his use of force was objectively
 13 reasonable such that he is entitled to qualified immunity.⁹

14 b. *Step Two: Whether the Constitutional Right Was Clearly Established*

15 Even if a reasonable jury could find that the defendant officers violated plaintiff’s Fourth
 16 Amendment right against the use of excessive force, the officers would be entitled to judgment in
 17 their favor on qualified immunity grounds if the right was not clearly established at the time of the
 18

19 ⁸ Nor does it seem could defendants make such an argument in light of the evidence that after
 20 plaintiff was shot by defendants and was laying on the ground being held at gun point by
 21 defendant Miller, Officer Gonzalez handcuffed plaintiff and located a small automatic handgun
 still tucked in the right side of plaintiff’s waistband under his shirt and sweatshirt. (Doc. No. 17-2
 at 41.)

22 ⁹ Because there is a genuine dispute of material fact precluding the court from resolving this
 23 factor on summary judgment, the court need not consider the remaining *Graham* factors, nor can
 24 the court complete the balancing test required under *Graham*. *See, e.g., Goodlow v. City of El*
Cajon, No. 13-cv-01524-DMS-NLS, 2015 WL 11251804, at *3 (S.D. Cal. Jan. 20, 2015)
 25 (denying summary judgment in the defendants’ favor as to the plaintiff’s excessive use of force
 26 claim, finding that there was a genuine dispute of fact regarding whether the plaintiff reached his
 hands toward his waistband); *Sommers v. City of Santa Clara*, 516 F. Supp. 3d 967, 981–83 (N.D.
 27 Cal. 2021) (denying summary judgment in the defendants’ favor as to the plaintiff’s excessive use
 28 of force claim, finding that there were genuine disputes of fact regarding whether the plaintiff
 posed an immediate threat to the officers and public and finding itself unable to complete the
 balancing test required under *Graham*).

1 encounter. *See C.V. ex rel. Villegas*, 823 F.3d at 1257. “A Government official’s conduct
2 violates clearly established law when, at the time of the challenged conduct, ‘[t]he contours of [a]
3 right [are] sufficiently clear’ that every ‘reasonable official would [have understood] that what he
4 is doing violates that right.’” *Ashcroft v. al-Kidd*, 563 U.S. 731, 741 (2011) (alterations in
5 original) (quoting *Anderson v. Creighton*, 483 U.S. 635, 640 (1987)); *see also Wesby*, 138 S. Ct.
6 at 589. “We do not require a case directly on point, but existing precedent must have placed the
7 statutory or constitutional question beyond debate.” *Wesby*, 138 S. Ct. at 590 (quoting *Ashcroft*,
8 563 U.S. at 741); *see also Jessop v. City of Fresno*, 936 F.3d 937, 940 (9th Cir. 2019).

9 It is not appropriate for courts to define clearly established law at a high level of
10 generality; instead, the inquiry “must be undertaken in light of the specific context of the case, not
11 as a broad general proposition.” *Mullenix v. Luna*, 577 U.S. 7, 12 (2015) (citation omitted); *see*
12 *also Wesby*, 138 S. Ct. at 590. “Such specificity is especially important in the Fourth Amendment
13 context, where . . . [i]t is sometimes difficult for an officer to determine how the relevant legal
14 doctrine, here excessive force, will apply to the factual situation the officer confronts.” *Mullenix*,
15 577 U.S. at 12 (internal quotation marks and citation omitted); *see also Peck*, 51 F.4th at 891.

16 In this case, plaintiff has pointed to evidence that raises a disputed issue of material fact
17 regarding whether the defendant officers saw plaintiff reach for his waistband just before he was
18 shot. Viewing the evidence before the court on summary judgment in the light most favorable to
19 plaintiff, a reasonable jury could find that plaintiff did not reach for his waistband. Assuming that
20 version of the facts to be true, the defendant officers’ actions violated clearly established law. As
21 noted above, the Ninth Circuit has repeatedly held that officers cannot use deadly force against a
22 suspect who does not threaten them with a weapon, even if a weapon is within the suspect’s reach
23 at the time. *See Curnow ex rel. Curnow v. Ridgecrest Police*, 952 F.2d 321, 325 (9th Cir. 1991)
24 (holding that officers could not use deadly force to shoot a fleeing armed suspect who was not
25 pointing a gun at the officers and was not facing them); *Gelhaus*, 871 F.3d at 1020 (specifically
26 recognizing that the 1991 decision in *Curnow* gave “‘fair notice’ that the use of deadly force is
27 unreasonable where the victim does not directly threaten the officer with the gun”); *see also id.* at
28 1010, 1021 (affirming the district court’s denial of the defendants’ motion for summary judgment

1 on qualified immunity grounds where the suspect had a gun in his hand with the barrel pointing
2 towards the ground); *see also Peck*, 51 F.4th at 887, 888 (determining that officers who shot a
3 suspect were not entitled to qualified immunity at summary judgment where, in drawing all
4 reasonable inferences in the plaintiff’s favor, the suspect was in the presence of a gun but never
5 picked it up and was moving away from it when he was shot); *George v. Morris*, 736 F.3d 829,
6 838 (9th Cir. 2013) (affirming the district court’s denial of the defendants’ motion for summary
7 judgment on qualified immunity grounds where the suspect held a gun with the barrel pointed
8 downward, without pointing it at the officers or engaging in threatening behavior).

9 Furthermore, in his opposition to the pending motion for summary judgment, plaintiff
10 cites to the Ninth Circuit’s decision in *Cruz v. City of Anaheim*, 765 F.3d 1076 (9th Cir. 2014)
11 (Doc. No. 13 at 17), a decision which this court finds to be highly relevant and directly applicable
12 to the present case. In that case, the Ninth Circuit considered the reasonableness of officers
13 “opening fire” on a suspect whom officers had pursued for suspected criminal activity, who was
14 reported to be carrying a gun in his waistband, and who was “surrounded by officers with guns
15 drawn.” *Cruz*, 765 F.3d at 1078, 1079. According to the officers’ accounts, the suspect “ignored
16 [the officers’] commands and instead reached for the waistband of his pants.” *Id.* Nonetheless,
17 the Ninth Circuit reversed the district court order granting summary judgment in the officers’
18 favor, holding that a genuine factual dispute existed as to whether the officers saw the suspect
19 reach for his waistband such that he posed an immediate threat at the time the officers shot him.
20 *Id.* at 1079–1080. As noted above, the Ninth Circuit stated that “[i]t would be unquestionably
21 reasonable for police to shoot a suspect in Cruz’s position if he reaches for a gun in his waistband,
22 or even if he reaches there for some other reason,” especially “[g]iven Cruz’s dangerous and
23 erratic behavior up to that point.” *Id.* at 1078. But the court went on to say that “[c]onversely, if
24 the suspect *doesn’t* reach for his waistband or make some similar threatening gesture, it would
25 clearly be unreasonable for the officers to shoot him[.]” *Id.* Thus, the Ninth Circuit’s decision in
26 *Cruz* established beyond any doubt that officers may not use deadly force against individuals who
27 are presumed to have a gun but do not reach for it or make any other movements indicating an
28 imminent threat to the officers or the public. *See id.*; *see also Peck*, 51 F.4th at 888 (“*Cruz*

1 establishes that officers may not fire at a suspect—even an armed suspect—absent some reason to
 2 believe that the suspect will soon access or use the weapon.”¹⁰

3 Even more recently, the Ninth Circuit reviewed a similar case and affirmed the lower
 4 court’s determination that the defendant officers were not entitled to qualified immunity on
 5 summary judgment where the officers shot plaintiff, who was armed and running away from
 6 them, and it was disputed whether the plaintiff reached for his pocket or gun. *See Edmond v.*
 7 *Lockwood*, No. 22-55024, 2023 WL 2423340 at *1 (9th Cir. Mar. 9, 2023).¹¹ In *Edmond*, the
 8 Ninth Circuit cited five Ninth Circuit decisions (all of which were decided before the shooting of
 9 plaintiff in this case), and held that it was “clearly established law” that officers “may not use
 10 deadly force on an individual who has not acted threateningly at any time during or prior to the
 11 encounter, even if they believe the individual has a firearm . . . [and] even where the suspect is
 12 fleeing on foot.” *Id.* (citations omitted).

13 In light of these binding Ninth Circuit decisions, the granting of summary judgment in the
 14 defendant officers’ favor is not appropriate here because their entitlement to qualified immunity
 15 depends on disputed factual issues which must be resolved by the trier of fact. *See Peck*, 51 F.4th
 16 at 888 (affirming the denial of summary judgment on qualified immunity grounds because
 17 “where, as here, a jury could find that no such movement occurred, our cases clearly establish that
 18

19 ¹⁰ In *Peck*, the Ninth Circuit concluded its analysis with the following:

20 To be sure, the Fourth Amendment does not necessarily “require[]
 21 officers to delay their fire until a suspect turns his weapon on them,”
 22 and “[i]f the person is armed—or reasonably suspected of being
 23 armed—a furtive movement, harrowing gesture, or serious verbal
 24 threat might create an immediate threat.” *George*, 736 F.3d at 838.
 25 But where, as here, a jury could find that no such movement
 occurred, our cases clearly establish that the use of deadly force
 would be impermissible. *Id.*; accord *Curnow*, 952 F.2d at 325; *Cruz*,
 765 F.3d at 1079. We therefore affirm the district court’s denial of
 qualified immunity to Montoya and Johnson at this stage of the
 litigation.

26 51 F.4th at 888.

27 ¹¹ Citation to this unpublished Ninth Circuit opinion is appropriate pursuant to Ninth Circuit Rule
 28 36-3(b).

the use of deadly force would be impermissible”); *Gelhaus*, 871 F.3d at 1021 (“Because [officer’s] entitlement to qualified immunity ultimately depends on disputed factual issues, summary judgment is not presently appropriate.”). Accordingly, the court will deny defendants’ motion for summary judgment as to plaintiff’s Fourth Amendment excessive use of force claim brought against defendants Abedrabbo and Miller.

2. Monell Liability

Defendants have also moved for summary judgment in favor of defendants City of Elk Grove and the Elk Grove Police Department as to plaintiff’s 42 U.S.C. § 1983 claim pursuant to *Monell v. Department of Social Services*, 436 U.S. 658 (1978) (Doc. No. 13 at 18), which appears to be predicated on a ratification theory of entity liability (Doc. No. 17 at 15–16). In opposing summary judgment, plaintiff asserts that the entity defendants ratified the wrongful shooting of plaintiff (*id.*) because the City of Elk Grove exonerated the defendant officers after an internal administrative investigation. (PUDF ¶ 28; 17-2 at 4.)

“[A] municipality cannot be held liable *solely* because it employs a tortfeasor—or, in other words, a municipality cannot be held liable under § 1983 on a *respondeat superior* theory.” *Crowe v. Cnty. of San Diego*, 608 F.3d 406, 445 (9th Cir. 2010) (quoting *Monell*, 436 U.S. at 691); *see also Bd. of Cnty. Comm’rs v. Brown*, 520 U.S. 397, 403 (1997). To prevail on his *Monell* claim against the city, plaintiff “must demonstrate that an ‘official policy, custom, or pattern’ on the part of [the city] was ‘the actionable cause of the claimed injury.’” *Tsao v. Desert Palace, Inc.*, 698 F.3d 1128, 1143 (9th Cir. 2012) (quoting *Harper v. City of Los Angeles*, 533 F.3d 1010, 1022 (9th Cir. 2008)); *see also Mendiola-Martinez v. Arpaio*, 836 F.3d 1239, 1247 (9th Cir. 2016) (stating that to establish municipal liability under § 1983, a plaintiff must show a direct causal link between the municipal policy or custom and the alleged constitutional violation).

A municipality may be liable under § 1983 if “the individual who committed the constitutional tort was an official with final policy-making authority or such an official ratified a subordinate’s unconstitutional decision or action and the basis for it.” *Rodriguez v. Cnty. of Los Angeles*, 891 F.3d 776, 802–03 (9th Cir. 2018) (quoting *Gravelet-Blondin v. Shelton*, 728 F.3d

1 1086, 1097 (9th Cir. 2013)). Ratification is generally a fact question for the jury, but “a plaintiff
 2 must establish that there is a genuine issue of material fact regarding whether a ratification
 3 occurred.” *Christie v. Iopa*, 176 F.3d 1231, 1238–39 (9th Cir. 1999). “To show ratification, a
 4 plaintiff must prove that the ‘authorized policymakers approve a subordinate’s decision and the
 5 basis for it.’” *Id.* at 1239 (quoting *City of St. Louis v. Praprotnik*, 485 U.S. at 127). “The mere
 6 failure to discipline [employees] does not amount to ratification of their allegedly unconstitutional
 7 actions.” *Sheehan v. City of San Francisco*, 743 F.3d 1211, 1231 (9th Cir. 2014), *rev’d in part on*
 8 *other grounds*, 575 U.S. 600 (2015); *see also Dodge v. Evergreen School Dist. #114*, 56 F.4th
 9 767, 788 (9th Cir. 2022); *Oakry v. City of Tempe*, No. 20-cv-01167-PHX-JAT, 2021 WL
 10 8155158, at *6 (D. Ariz. May 18, 2021) (“[I]t is well-settled in this circuit that without
 11 ‘something more,’ a City’s failure to discipline an officer, or its finding that an officer’s conduct
 12 did not violate policy, does not amount to ratification.”); *Mueller v. Cruz*, No. 13-cv-01274-CJC-
 13 JCG, 2015 WL 9455565, at *3 (“[C]ourts in this circuit have stopped short of holding that a
 14 plaintiff can prove *Monell* liability simply on the basis of a defendant department’s post-incident
 15 ratification through failure to discipline or take other action concerning the officer directly
 16 involved.”).

17 Here, plaintiff has not established a genuine issue of material fact with regard to whether
 18 any policymaker knew of the defendant officers’ actions “before the alleged constitutional
 19 violations ceased.” *Christie*, 176 F.3d at 1239. Rather, plaintiff’s *Monell* claim is based on an
 20 Elk Grove Police Department supervisor’s exoneration of defendants Miller and Abedrabbo *after*
 21 their alleged use of excessive force. (Doc. Nos. 1 at ¶ 17; 17 at 15–16; 17-2 at 69.)
 22 Consequently, a violation of plaintiff’s constitutional right to be free from excessive force was not
 23 *caused* by the purported actions of any policymaker at the Elk Grove Police Department, as is
 24 required by *Monell*. *See Mueller*, 2015 WL 9455565, at *3 (holding that *Monell* liability could
 25 not be established based on the plaintiff’s allegation that the officer in question was exonerated
 26 after the alleged use of excessive force occurred); *Chavez v. City of Hayward*, No. 14-cv-00470-
 27 DMR, 2015 WL 3833536, at *8 (N.D. Cal. June 19, 2015) (“Chief Urban’s exoneration of the
 28 Defendant Officers took place after the alleged use of excessive force; therefore, her action did

not result in or cause the violation of Plaintiff’s constitutional right to be free from excessive force.”).

Accordingly, the court will grant defendants’ motion for summary judgment on plaintiff’s § 1983 constitutional claim brought against the Elk Grove Police Department and the City of Elk Grove under *Monell*.

3. State Law Claims

Defendants also move for summary judgment in their favor on plaintiff’s state law claims. (Doc. No. 13 at 19.)

a. *Bane Act Claim*

The Bane Act provides a right of action to “[a]ny individual whose exercise or enjoyment of rights secured by the Constitution or laws of the United States, or of rights secured by the Constitution or laws of [California] has been interfered with” by another person’s “threats, intimidation, or coercion.” Cal. Civ. Code § 52.1(b)–(c). To prevail on a claim for violation of the Bane Act, a plaintiff must show “a specific intent to violate the arrestee’s right to freedom from unreasonable seizure.” *Reese v. Cnty. of Sacramento*, 888 F.3d 1030, 1043 (9th Cir. 2018) (citing *Cornell v. City of San Francisco*, 17 Cal. App. 5th, 766, 801 (2017)). A “mere intention to use force that the jury ultimately finds unreasonable—that is, general criminal intent—is insufficient.” *Id.* at 1045 (quoting *United States v. Reese*, 2 F.3d 870, 885 (9th Cir. 1993)). Instead, “the jury must find that the defendants intended not only the force, but its unreasonableness, its character as more than necessary under the circumstances.” *Id.* (internal quotations omitted). However, it is not necessary for defendants “to have been thinking in constitutional or *legal terms* at the time of the incidents, because a reckless disregard for a person’s constitutional rights is evidence of a specific intent to deprive that person of those rights.” *Id.* (internal quotations omitted).

The inquiry into specific intent focuses on: (1) whether “the right at issue [was] clearly delineated and plainly applicable under the circumstances of the case”; and (2) whether the “defendant commit[ed] the act in question with the particular purpose of depriving the citizen victim of his enjoyment of the interests protected by that right[.]” *Sandoval v. Cnty. of Sonoma*,

1 912 F.3d 509, 520 (9th Cir. 2018) (citation omitted). If both requirements are met, “specific
2 intent can be shown ‘even if the defendant did not in fact recognize the unlawfulness of his act’
3 but instead acted in ‘reckless disregard’ of the constitutional right.” *Id.* (quoting *Cornell*, 17 Cal.
4 App. 5th at 803).

5 Here, defendants argue that they are entitled to summary judgment in their favor on
6 plaintiff’s Bane Act claim because there is no evidence before the court on summary judgment
7 that the defendant officers possessed the requisite “specific intent” to violate plaintiff’s rights.
8 (Doc. No. 13 at 20.) The court disagrees.

9 Plaintiff’s claim against defendants for violation of the Bane Act is based on the same
10 alleged facts as his claim of use of excessive force in violation of the Fourth Amendment. The
11 court has concluded that, viewing the evidence in the light most favorable to plaintiff, a
12 reasonable juror could conclude that the defendant officers acted unreasonably under the Fourth
13 Amendment when they shot plaintiff. From this same evidence, a reasonable juror could
14 conclude that the defendant officers acted in reckless disregard for plaintiff’s rights. *See Taylor v.*
15 *Cnty. of Calaveras*, No. 1:18-cv-00760-BAM, 2020 WL 7406527, at *17 (E.D. Cal. Dec. 17,
16 2020) (“Because Plaintiffs’ Bane Act claims are, at a minimum, predicated on the same facts as
17 the unlawful entry, arrest and excessive force claims . . . , and genuine disputes of fact exist with
18 respect to those claims, summary judgment cannot be granted.”); *Est. of Smith v. Holslag*, No. 16-
19 cv-02989-WQH-MSB, 2020 WL 7863428, at *11 (S.D. Cal. Dec. 31, 2020), *aff’d and remanded*,
20 No. 21-55073, 2022 WL 1224001 (9th Cir. Apr. 26, 2022) (finding that because the Bane Act
21 claim was based on the same facts as the Fourth Amendment claim, and because the court had
22 already found that a reasonable juror could conclude that the defendant officer acted unreasonably
23 under the Fourth Amendment when he shot and killed the decedent, a reasonable juror could
24 conclude from those same facts that the defendant officer acted in reckless disregard of the
25 decedent’s rights.). Accordingly, defendants’ motion for summary judgment in their favor with
26 respect to plaintiff’s Bane Act claim will be denied.

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b. *Negligence Claim*

Defendants also argue that they are entitled to summary judgment in their favor on plaintiff's negligence claim because plaintiff has produced no evidence suggesting any negligence on the part of the defendant officers. (Doc. No. 13 at 20.) Furthermore, they argue that "it cannot be disputed that all officers only shot at Tucker after he refused to comply and instead reached for his loaded handgun in his waistband." (*Id.* at 21.) As discussed in detail above, the court has determined that based upon the evidence presented on summary judgment, triable questions of material fact exist with respect to whether defendants' version of the relevant facts is true, as well as to the reasonableness of the defendant officers' actions. Therefore, defendants' argument in support of their motion for summary judgment on plaintiff's negligence claim is unavailing. *See Banks v. Mortimer*, 620 F. Supp. 3d 902, 935 (N.D. Cal. 2022) (noting that courts analyze negligence claims "under the same rubric as § 1983 claims based on the Fourth Amendment"). Accordingly, the court will also deny defendants' motion for summary judgment in their favor as to plaintiff's negligence claim.

c. *Other State Law Claims*

Defendants summarily argue in their motion that they are entitled to summary judgment in their favor as to plaintiff's remaining state law claims (violation of Article I § 13 of the California Constitution; violation of California Civil Code § 43; and battery) merely because they are entitled to summary judgment on plaintiff's § 1983 claims. (Doc. No. 13 at 19.) Because the court has concluded that defendants' motion for summary judgment as to plaintiff's § 1983 claims must be denied, defendants' argument with respect to plaintiff's remaining state law claims is unpersuasive. Accordingly, the court will also deny defendants' motion for summary judgment as to plaintiff's remaining state law claims.

CONCLUSION

For the reasons explained above,

1. Defendants' motion for summary judgment (Doc. No. 13) is granted in part and denied in part as follows:

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a. Defendants' motion for summary judgement in their favor as to plaintiff's 42 U.S.C. § 1983 claim brought pursuant to *Monell* against defendants City of Elk Grove and the Elk Grove Police Department is granted; and

b. Defendants' motion is otherwise denied;

2. Plaintiff's motion to strike (Doc. No. 16), which the court construed as plaintiff's evidentiary objections, is overruled; and

3. Consistent with the initial scheduling order which still governs in this case, the "parties are ordered to file a Joint Notice of Trial Readiness not later than thirty (30) days" after the date of entry of this order. (Doc. No. 4 at 5.)

IT IS SO ORDERED.

Dated: July 26, 2023


UNITED STATES DISTRICT JUDGE